

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTIN GARCIA)	
Claimant)	
VS.)	
)	
IBP, INC.)	Docket No. 223,052
Respondent,)	
Self-Insured)	

ORDER

Claimant appealed the June 5, 2000 Decision entered by Administrative Law Judge Pamela J. Fuller. The Appeals Board heard oral argument on November 8, 2000.

The Director of the Division of Workers Compensation appointed Stacy Parkinson of Olathe, Kansas, to serve as Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Wendel W. Wurst of Garden City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Decision.

ISSUES

This is a claim for a May 27, 1995 accident and resulting injury to the low back. After recovering from the accident, claimant returned to work for respondent earning wages comparable to those that he was earning on the date of accident. Therefore, Judge Fuller awarded claimant permanent partial general disability benefits based upon claimant's functional impairment rating, which the Judge found to be 12 percent.

Claimant contends Judge Fuller erred. Claimant argues that only Dr. Nathan Shechter properly applied the revised third edition of the *AMA Guides to the Evaluation of*

Permanent Impairment to evaluate claimant's permanent functional impairment. Therefore, claimant argues that the Judge should have awarded claimant permanent partial general disability benefits based upon Dr. Shechter's 22 percent whole body functional impairment rating instead of the 12 percent rating provided by Dr. Terrance Tisdale.

Conversely, respondent argues that the June 5, 2000 Decision should be affirmed.

The only issue before the Board on this review is the nature and extent of claimant's injury and functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. After reviewing the entire record and considering the parties' arguments, the Appeals Board finds and concludes that the June 5, 2000 Decision should be modified to award claimant benefits for a 20 percent permanent partial general disability.
2. On May 27, 1995, claimant injured his low back while working for respondent. As a result of that injury, claimant underwent back surgery which included fusing the L5 and S1 vertebrae.
3. On March 3, 1998, Dr. Nathan Shechter examined claimant and determined that claimant had a spondylolisthesis between L5-S1 that was aggravated by the May 1995 accident. According to Dr. Shechter's analysis, claimant had a two percent whole body functional impairment before the May 1995 accident compared to the 22 percent whole body functional impairment that he has now. In determining claimant's functional impairment ratings, Dr. Shechter used the third edition of the *AMA Guides to the Evaluation of Permanent Impairment* (the *Guides*), which specifically provides that any impairment from the loss of range of motion or nerve root injury is to be added to the base rating provided for specific disorders of the spine. In calculating claimant's functional impairment, the doctor included the functional impairment from loss of range of motion and nerve root involvement.
4. Dr. Terrance Tisdale also examined and evaluated claimant. Dr. Tisdale did not attempt to quantify or rate claimant's impairment due to loss of range of motion and, therefore, did not consider that loss in formulating the 12 percent whole body functional impairment that he found.
5. Dr. Robert Eyster also provided a functional impairment opinion. Dr. Eyster rated claimant as having a 10 percent whole body functional impairment. In formulating his rating, Dr. Eyster did not attempt to quantify or rate any loss of range of motion that claimant may have sustained.
6. Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by K.S.A. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. **In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment [sic], if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . . (Emphasis added.)

7. The Appeals Board finds that Dr. Shechter's functional impairment opinion should be used as it best complies with the third edition of the *AMA Guides* as Dr. Shechter's rating addresses the impairment from loss of range of motion. Therefore, the Appeals Board finds that claimant has a 22 percent whole body functional impairment as a result of the May 1995 work-related accident, two percent of which preexisted.

8. The Workers Compensation Act provides that awards should be reduced by the amount of preexisting functional impairment when an accident aggravates a preexisting condition. The Act reads, in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.¹

The Appeals Board concludes that the two percent preexisting functional impairment rating should be deducted when determining claimant's permanent partial general disability. Therefore, claimant should receive benefits for a 20 percent permanent partial general disability as a result of the May 1995 accident.

¹ K.S.A. 44-501(c).

AWARD

WHEREFORE, the Appeals Board modifies the June 5, 2000 Decision and increases the permanent partial general disability from 12 percent to 20 percent.

Martin Garcia is granted compensation from IBP, Inc., for a May 27, 1995 accident and resulting disability. Based upon an average weekly wage of \$554.71, Mr. Garcia is entitled to receive 15.72 weeks of temporary total disability benefits at \$319 per week, or \$5,014.68, plus 82.86 weeks of permanent partial disability benefits at \$319 per week, or \$26,432.34, for a 20 percent permanent partial general disability, making a total award of \$31,447.02, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Decision that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Wendel W. Wurst, Garden City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director